Tahan Insurance Bhd v Saratim Insurance Agency Services Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO 22–156 OF 2002–111(11)
DAVID WONG J
31 MARCH 2008

Agency — Agency agreement — Interpretation — Payment for unpaid premiums — Whether agent liable for unpaid premiums to principal

Contract — Estoppel — Estoppel by conduct — Unpaid premiums was written off in the past and agent was never held to be accountable for unpaid premiums — Whether principal estopped from holding agent liable for unpaid premiums

The plaintiff was a nation wide insurance company in Malaysia and the defendant was an insurance agent based in Kuching and was authorised to solicit general insurance business on behalf of the plaintiff by virtue of a written general insurance agency agreement dated 13 January 1993 ('the agency agreement') entered into between the parties. The plaintiff's claim against the defendant was for unpaid premium of RM197,448.39 in respect of insurance business transacted by the defendant as agent on behalf of the plaintiff and was made pursuant to cl 3.2 of the agency agreement which in essence provided that the defendant was liable for the payment of premium in respect of insurance business transacted by the defendant on behalf of the plaintiff irrespective of whether or not such premium had been collected or received by the defendant. The defendant not only filed a defence but also a counterclaim asking for an account of profit commission under the loggers group personal accident claim for the year 2001 and 2002 and for payment of the profit commission. Among other things the defence were as follows: (i) the plaintiff was estopped to hold the defendant liable as the plaintiff had never in the past held the defendant accountable for unpaid premiums and had in the past written-off unpaid premiums as bad debts and also had on occasions elected to pursue including taking legal action against the policy holder directly for unpaid premium; (ii) under the 60 days premium warranty clause ('PWC'), the plaintiff should have automatically cancelled policies on non-payment of premium and as such could not hold or was estopped from holding the defendant responsible for the unpaid premiums.

Held:

(1) The PWC was not a term of the agency agreement; hence any interpretation of the PWC must be done within the context of the relationship between the plaintiff and the defendant. That relationship was governed by the agency agreement which among other obligations placed the responsibility of collecting of premiums and made the defendant personally liable to the plaintiff for the payment of premiums in respect of all insurance business transacted by the defendant on behalf of the plaintiff whether or not any such premium had been collected or received by the defendant. What that meant was that it was not possible for policies transacted by the defendant to be automatically terminated by the lapse of time (60 days) as the plaintiff would not know whether the premiums had been collected by the defendant (see para 9).

(2) As for the agency agreement not being strictly enforced, there were just no cogent evidence of the plaintiff's conduct which would give rise to a waiver of the plaintiff's rights under the agency agreement. Furthermore the evidence showed that whenever there was a bad debt written off, there would always be a request by the defendant and only after due consideration would the plaintiff approve such request (see para 11).

(3) There was no provision in the agency agreement which provided that the plaintiff could not on its own accord take legal action against the policy holders for recovery of unpaid premium. In fact there was a specific provision in cl 13.1 in the agency agreement which allowed the plaintiff 'to defend, negotiate, settle, compromise or admit any claim, costs, action or proceedings whatsoever and to deal with any actual and potential loss or damages...' (see para 15).

(4) The dispute between the parties on how the profit commission should be computed in view of the Bank Negara guidelines JB1/GB2 dated 25 October 1999 which provided for profit commission to be calculated based on 'overall portfolio'. As the words 'overall portfolio' were not defined in the guidelines one had to look at the evidence as to how the profit commission was calculated in the past for the simple reason that the words 'overall portfolio' were used in both the addendum to the agency agreement and Bank Negara guidelines (see para 19).

[Bahasa Malaysia summary

Plaintif adalah satu syarikat insurans yang beroperasi di seluruh Malaysia dan defendan adalah satu ejen insurans yang bertempat di Kuching dan diberi

kuasa untuk mendapatkan perniagaan insurans am bagi pihak plaintif mengikut satu perjanjian bertulis agensi insurans am bertarikh 13 Januari 1993 (perjanjian agensi tersebut) yang dimasuki di antara pihak-pihak. Tuntutan plaintif terhadap defendan adalah untuk premium yang belum dibayar sebanyak RM197,448.39 berhubungan dengan perniagaan insurans yang dijual oleh defendan sebagai ejen bagi pihak plaintif dan dilakukan mengikut klausa 3.2 perjanjian agensi tersebut yang pada dasarnya memperuntukkan bahawa defendan adalah bertanggungan untuk membayar premium berhubungan dengan perniagaan insurans yang dijual oleh defendan bagi pihak plaintif tidak kira sama ada premium sedemikian telah dikutip atau diterima oleh defendan. Defendan bukan sahaja memfailkan satu pembelaan tetapi juga satu tuntutan balas meminta satu pengiraan komisyen keuntungan di bawah tuntutan kumpulan kemalangan peribadi untuk tahun 2001 dan 2002 dan juga bayaran untuk komisyen keuntungan. Antara yang lain pembelaan adalah seperti berikut: (i) plaintif diestop daripada menyatakan defendan bertanggungan oleh kerana plaintif tidak pernah pada masa lepas menyatakan bahawa defendan adalah bertanggungan untuk premium yang belum dibayar dan telah pada masa lepas membatalkan premium yang belum dibayar sebagai 'bad debts' dan juga telah beberapa kali memilih untuk mengambil tindakan undang-undang terhadap pemegang polisi secara terus untuk premium yang belum dibayar; (ii) di bawah 60 hari klausa waranti premium (KWP), plaintif sepatutnya secara otomatik membatalkan polisi-polisi atas kegagalan membayar premium dan dengan itu tidak boleh menyatakan atau diestop daripada menyatakan bahawa defendan bertanggungjawab untuk premium-premium yang belum dibayar.

Diputuskan:

(1) KWP bukanlah satu terma perjanjian agensi; dengan itu sebarang tafsiran KWP harus dilakukan dalam konteks perhubungan di antara plaintif dan defendan. Perhubungan tersebut tertakluk kepada perjanjian agensi yang antara obligasi yang lain meletakkan tanggungjawab mengutip premium-premium dan menjadikan defendan bertanggungan secara peribadi kepada plaintif untuk bayaran premium berhubungan dengan kesemua perniagaan insurans yang dijualkan oleh defendan bagi pihak plaintif sama ada sebarang premium telahpun dikutip atau diterima oleh defendan. Apa yang dimaksudkan itu ialah ia adalah tidak mungkin untuk polisi-polisi yang dijualkan oleh defendan dibatalkan secara otomatik melalui keluputan had masa (60 hari) oleh kerana plaintif tidak akan tahu sama ada premium-premium tersebut telah pun dikutip oleh defendan atau tidak (lihat perenggan 11).

(2) Berhubung dengan perjanjian agensi yang tidak dikuatkuasakan dengan tegas, tiada keterangan yang meyakinkan mengenai tindakan plaintif yang dapat membangkitkan satu penepian hak plaintif di bawah perjanjian agensi tersebut. Selanjutnya keterangan menunjukkan bahawa apabila terdapat 'bad debt' yang dibatalkan, selalunya terdapat satu permintaan oleh defendan dan hanya selepas pertimbangan sewajarnya, plaintif akan membenarkan permintaan sedemikian (lihat perenggan 11).

(3) Tiada peruntukan di dalam perjanjian agensi yang menyatakan bahawa plaintif tidak boleh atas kehendaknya sendiri mengambil tindakan undang-undang terhadap pemegang-pemegang polisi untuk mendapatkan kembali premium yang belum dibayar. Sebenarnya terdapat peruntukan yang khusus di klausa 13.1 perjanjian agensi yang membenarkan plaintif 'to defend, negotiate, settle, compromise or admit any claim, costs, action or proceedings whatsoever and to deal with any actual and potential loss or damages …'(lihat perenggan 15).

(4) Pertikaian di antara pihak-pihak atas bagaimana komisyen keuntungan patut dikira mengikut Garis Panduan Bank Negara JB1/GB2 bertarikh 25 Oktober 1999 yang memperuntukkan bahawa komisyen keuntungan dikira berdasarkan 'overall portfolio'. Oleh kerana perkataan 'overall portfolio' tidak ditafsirkan di garis panduan, seseorang perlu melihat kepada keterangan bagaimana komisyen keuntungan dikira pada masa terdahulu atas sebab perkataan-perkataan 'overall portfolio' telah digunakan di kedua-dua tambahan kepada perjanjian agensi dan juga di dalam garis panduan Bank Negara (lihat perenggan 20).]

Notes

For cases on estoppel by conduct, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3531–3542.

For cases on interpretation, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 893–894.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
Insurance Act 1963 s 114

Stanley Eddy (Battenberg & Talma Advocates) for the plaintiff.
Albert Tang (Chew Jugah Wan Ullok & Co) for the defendant.

David Wong J:

INTRODUCTION

[1] The plaintiff is a nation wide insurance company in Malaysia with its head office situated at Kuala Lumpur and a branch office in Kuching, Sarawak. The defendant is an insurance agent based in Kuching and is authorised to solicit general insurance business on behalf of the plaintiff by virtue of a written General Insurance Agency Agreement dated 13 January 1993 (the agency agreement) (p 1 exh A) entered into between the parties.

[2] The plaintiff's claim against the defendant is for unpaid premium of RM197,448.39 in respect of insurance business transacted by the defendant as agent on behalf of the plaintiff and is made pursuant to cl 3.2 of the agency agreement which in essence provides that the defendant is liable for the payment of premium in respect of insurance business transacted by the defendant on behalf of the plaintiff irrespective of whether or not such premium has been collected or received by the defendant.

[3] The defendant not only filed a defense but also a counterclaim. The points of the defense and counterclaim are accurately summarised by Mr Stanley Eddy (Mr Eddy), counsel for the plaintiff, and to save time I reproduce in verbatim the summary:

(i) the alleged outstanding sum consists of unpaid premiums by the plaintiff's policy holders (para 5 of the defence).

(ii) plaintiff is estopped and/or has waived its right to hold the defendant liable for unpaid premiums purportedly on the following grounds:

(a) the plaintiff has never in the past held the defendant accountable for unpaid premiums;

(b) the plaintiff has never in the past imposed or charged the defendant interest on premiums owing;

(c) the plaintiff had in the past written-off unpaid premiums as bad debts;

(d) the plaintiff has on occasions elected to pursue including taking legal action against the policy holder directly for unpaid premium (para 6 of defence).

(iii) the defendant alleged that in the course of business relationship between the parties, the plaintiff expressly represented and/or by

conduct, that the plaintiff would not make the defendant liable for unpaid premiums (para 7 of defence).

(iv) Premium Warranty Clause

> The defendant in paras 8 and 9 of the defence contend that under the 60 days Premium Warranty Clause, the plaintiff should have automatically cancelled policies on non-payment of premium and as such cannot hold or is estopped from holding the defendant responsible for the unpaid premiums.

(v) The defendant had also put in a counterclaim asking for an account of Profit Commission under the Loggers Group Personal Accident claim ('LGPA') for the year 2001 and 2002 and for payment of the Profit Commission together with interest and costs.

ISSUES

1. *Is there a real dispute to the amount claim (RM197,448.39)?*

[4] To the credit of Mr Albert Tang ('Mr Tang'), counsel for the defendant, he had rightly conceded that there is in fact no dispute as to the arithmetic accuracy of the amount claimed despite the fact that the defendant had in its defense made a mere denial of this claim and put the plaintiff to strict proof. Such bare defense has been treated by the court as a non-defense. The breakdown of RM197,448.39 are as follows:

Coming Dragon Sdn Bhd	RM46,405.71
Hakivest Sdn Bhd	RM217.89
Mile Eight Parts Trading Sdn Bhd	RM153,656.81
Others	RM2,832.02

[5] However the defendant's liability is denied on two grounds:

(1) The existence of the premium warranty clause; and

(2) The plaintiff is prohibited from claiming from the defendant on the ground that its conduct amounted to a waiver of its right to claim for the outstanding premiums.

2. *What is the effect of premium warranty clause ('PWC') on the relationship between the plaintiff and the defendant?*

[6] The relevant portion of the PWC reads:

A It is fundamental and absolute special condition of this contract of insurance that the premium due must be paid and received by the insurer within sixty (60) days from the inception date of this Policy/Endorsement/Renewal Certificate.

If this condition is not complied with then this contract is automatically cancelled and the Company shall be entitled to the pro rata premium for the period they have been at risk.

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C [7] Mr Tang submits that the natural meaning of PWC must be given effect to and that is that failure to pay the premium for the insurance policy within 60 days from the inception date of the policy/renewal certificate would result in the automatic cancellation of the insurance policy. Furthermore he relies on s 114 of the Insurance Act to submit that it is against public policy for a general insurance company to assume any risk unless and until the premium payable is received in such manner and within such time as may be prescribed which means premium is to be received in this case within 60 days failing which the policy concerned would be automatically cancelled as prescribed by the PWC.

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E [8] Relying on that construction, he submits that the correct amount due under the Coming Dragon Sdn Bhd and Mile Eight Parts and Trading Sdn Bhd are as follows:

Coming Dragon Sdn Bhd

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At para 40 and 41, DW1 says:

40. The single largest item under Coming Dragon Sdn Bhd is the fire policy shown at p 27 of ABOD 'C'. Page 1 of ABOD 'B', is a letter from the plaintiff to Coming Dragon Sdn Bhd. In this letter, the company served a 14 days cancellation notice for non-compliance with the premium warranty clause. Page 26 of ABOD 'C' is the Endorsement Schedule cancelling the said fire policy. I verily believe that there is an under refund upon the cancellation from non-compliance with the Premium Warranty Clause.

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Particulars

Gross Premium	Commission	Service Tax	Stamp Duty	Nett
RM88,340	13,251	4,417	2.00	RM79,508

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Cancellation according to Premium Warranty Clause

Gross Premium	Commission	Service Tax	Nett refund
RM73,818.36	11,072.75	3,690.93	(RM66,436.54)

Amount refunded nett as per statement in page 27 of ABOD 'C' and also p 6 of Encl 117	*RM10,455.59*
Amount under credited	*(RM55,980.95)*

Arising from the above, there ought to be a credit balance under Coming Dragon Sdn Bhd's account in the sum of RM46,405.71 minus RM55,981.45 = RM9,575.74

Mile Eight Parts and Trading Sdn Bhd:

> In respect of Mile Eight Parts and Trading Co the 'premium' according to PWC is limited to 60 days pro rata premium because to assume risk over this premium warranty period without receiving the premium payable in the prescribed manner is against s 141 of the Insurance Act 1996 and it also militates against the very wordings of PWC.
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> So, assuming (but without admitting) that if RM153,658.81 the sum which the plaintiff claims against the defendant as the uncollected whole year premium from Mile Eight Parts Trading Sdn Bhd, then the 60 days pro rata premium would only be roughly RM25,248.65. However, it is the defendant's case that for the reasons set out in the paragraphs following even this sum of RM25,248.65 is not payable.

Having read the submission of Mr Eddy and after careful evaluation of Mr Tang's submission, I prefer Mr Eddy's submission and my reasons are as follows:

1. The PWC is not a term of the agency agreement; hence any interpretation of the PWC must be done within the context of the relationship between the plaintiff and the defendant. That relationship is governed by the agency agreement which among other obligations places the responsibility of collecting of premiums and makes the defendant personally liable to the plaintiff for the payment of premiums in respect of all insurance business transacted by the defendant on behalf of the plaintiff whether or not any such premium has been collected or received by the defendant. What that means is that it is not possible for policies transacted by the defendant to be automatically terminated by the lapse of time (60 days) as the plaintiff would not know whether the premiums had been collected by the defendant. Hence I find what PW1 said at para 13 of her witness statement to be more credible. This is what she said:

> 13. The policy will not be automatically terminated as a result of non-payment of premium unless the insurer informs the policy holder in writing that cover has lapsed per the terms of the premium warranty.
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> The above condition is not a term or condition in the agency agreement. An"″Should the index be to the bold entry with the reference to the number in square brackets? Are the page references required?"″agent is thereby not entitled to invoke this clause.

Where the insurance business is transacted by the defendant as agent of the plaintiff the matter as to whether premium has been paid is within the knowledge and responsibility of the defendant as agent. As such, the defendant would have to advise or make a request to the plaintiff requesting them to invoke the premium warranty clause for non-payment of premium.

The plaintiff when invoking the premium warranty condition would then issue a letter directly to the policy holder terminating the policy. An instance of this is the letter dated 17 March 1998 at p 1 of the agreed bundle of documents (Authenticity only).

2. PW1's evidence is in fact corroborated by the evidence of DW1 which are fully set out by Mr Eddy at pp 12 to 14 of his submission and they can be summarised as follows:

1. Policy can only be terminated by giving a 14 day notice to the policy holders. (see PIAM's circular in exh D1, item 1, last 2 lines)
2. Policy had been known to be effective beyond the 60 days period.
3. Only the defendant would know whether premiums had been collected within the 60 days.
4. Premiums had been collected and accepted by the defendant after the lapse of the 60 days.
5. The plaintiff would still be at risk until the policy is cancelled.

ESTOPPEL

Mr Tang relies on two grounds:

1. *The agency agreement was not strictly enforced*

[9] Here he refers to two letters of the plaintiff informing the defendant that they were writing off RM2,403.68 and RM7,832.26 respectively as bad debts. By those two letters, Mr Tang submits that the defendant was entitled to have its debts written off as a matter of course. As rightly pointed out by Mr Eddy there are just no cogent evidence of the plaintiff's conduct which would give rise to a waiver of the plaintiff's rights under the agency agreement. In fact DW1 in his witness statement (DW1-A) never said that there was an expressed or implied waiver. He only assumed because the plaintiff never 'mentioned or demanded' for the outstanding premium. Furthermore the evidence showed that whenever there was a bad debt written off, there would always be a request by the defendant and only after due consideration would the plaintiff approve such request. This much is clear in

the two letters exhibited at pp 24 and 29 of exh B. At p 24 in the third para, DW1 wrote to the plaintiff in respect of the Dragoncom Sdn Bhd, Coming Dragon Sdn Bhd and Mile Eight Parts Trading Sdn Bhd accounts in the following terms:

> …and I would like to propose to your esteemed organization to consider to write off the above outstanding accounts as bad debts

Again at p 29 of exh B, DW1 wrote 'Please be informed that we did not request you to write off the outstanding premiums amounting RM409,446.68 as mentioned in your letter …

[10] Accordingly, I find this contention to be without merit.

2. *The plaintiff had agreed to seek direct recovery from Mile Eight*

[11] The circumstances relied on by Mr Tang for this ground is set out at pp 11–14 which can be summarised as follows:

1. The plaintiff during the period of trying to get Mile Eight Parts and Trading Sdn Bhd to regularise the premium payment in its letter dated 23 June 1998 never mentioned that said the defendant is liable for the unpaid premium.
2. Between the period from February 1999 to April 2002, the plaintiff continued to pay the defendant profit commission and had also agreed to write off certain bad debts.
3. On 8 March 2001, the plaintiff informed the defendant that it will recover the Dragoncom's outstanding premium direct from them through legal means.
4. On 26 July 2001, the plaintiff itself took legal action against Mile Eight without informing the defendant.
5. On 9 January 2004 and 16 January 2004 the plaintiff gave the defendant two cheques for RM22,166.31 and RM17,472.31 being refund of premium.

[12] It is Mr Tang's contention that the above conducts of the plaintiff had led the defendant to believe that its strict rights under the agency agreement will not be insisted upon and to support his contention he relies on the oft quoted case of *Boustead Trading [1985] Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[13] I shall first deal with the fact that the plaintiff took legal action itself to recover the unpaid premium. Mr Tang has not shown me that there is a

provision in the agency agreement which provides that the plaintiff cannot on its own accord take legal action against the policy holders for recovery of unpaid premium. In fact there is a specific provision in cl 13.1 in the agency agreement which allows the plaintiff *to defend, negotiate, settle, compromise or admit any claim, costs, action or proceedings whatsoever and to deal with any actual and potential loss or damages in such manner as the plaintiff shall absolutely deem fit and without affecting in any way the Agent's obligations to indemnify the Plaintiff under the Agreement*.

[14] As for the evidence that there was payment of profit commission by the plaintiff during the relevant period, it is neither here nor there. the plaintiff's action against the defendant was taken only after it knew that Mile Eight has been wound up. In any event, the defendant cannot ignore what is stated in cll 12.4.5 and 15.1 of the agency agreement, which respectively states as follows:

> 12.4.5 The Agent (the defendant) shall indemnify and hold the Company (the plaintiff) harmless against all claims actions proceedings damage costs expenses and any other loss of whatever nature (including the Company's legal expenses on a full indemnity basis) arising from or in any way attributable to any steps action or proceedings taken by the Company for recovery of premiums due to the Company.
>
> 15.1 No failure omission or delay on the part of the Company (the plaintiff) in exercising any right power privilege or remedy upon any default on the part of the Agent (the defendant) shall impair any such right power privilege or remedy or to be constructed as a waiver thereof or an acquiescence in any such default or affect or impair power privilege or remedy of the Company in respect of any other subsequent default.

[15] Furthermore if the defendant's contention is allowed to prevail it will mean that I will be contravening ss 91 and 92 of the Evidence Act which prohibits the admission of oral evidence to contradict the terms of a written agreement.

COUNTERCLAIM

[16] In its counterclaim the defendant is asking for an account of profit commission under the LGPA scheme for the year 2001–2002 and payment of such profit commission. Pursuant to an Addendum No 193/92 to the agency agreement, the plaintiff had agreed to pay the defendant profit commission. The dispute between the parties is how the profit commission

should be computed in view of the Bank Negara Guidelines JB1/GB2 dated 25 October 1999 which provides for profit commission to be calculated based on 'overall portfolio'.

[17] The plaintiff's contention here is that because of the words 'overall portfolio' the defendant's two accounts have to be combined to calculate the profit commission. The words 'overall portfolio' are not defined in the guidelines and as such I agree with Mr Tang's contention that one now has to look at the evidence as to how the profit commission was calculated in the past for the simple reason that the words 'overall portfolio' were used in both the addendum to the agency agreement dated 1 April 1992 (p 21 of exh A) and Bank Negara Guidelines JB1/GP2 dated 25 October 1999 (p 97 of exh B). It is not disputed that prior to the plaintiff's letter dated 27 April 2002 the defendant had been receiving profit commission based on the formula containing the words 'overall portfolio' which did not combine the two accounts. The plaintiff in my view had not given any credible reason why there should be a change in calculation bearing in mind that the words 'overall portfolio' are present in the formula for calculation of profit commission pre and post Bank Negara Guidelines JB1/GB2 dated 25 October 1999. Furthermore the evidence of DW2 in respect of the LGPA's scheme had not been seriously challenged by the plaintiff.

CONCLUSION

[18] For reasons stated above, I make the following orders:

In respect of the plaintiff's statement of claim:

1. Judgment to the plaintiff in the sum of RM197,448.39.
2. Interest of 4% on the sum of RM197,448.39 from the date of the writ to the date of this judgment and thereafter interests of 8% until the judgment sum is fully paid.
3. Costs to the plaintiff to be taxed unless agreed.

In respect of the defendant's counterclaim:

1. An account of profit commission under the LGPA scheme for the year 2001 and 2002.
2. Payment of profit commission under the LGPA scheme for the year 2001 and 2002 (profit commission amount).

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3. Interests of 4% on the profit commission amount from the date of the writ to the date of this judgment and thereafter interests of 8% until the judgment sum is fully paid

4. Costs to the defendant to be taxed unless agreed.

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Order accordingly.

Reported by Sally Kee

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